Missouri
Department of
Natural Resources

The following comments were submitted by the Missouri Office of the Attorney General on October 6, 2006.

Comments from the Missouri Office of the Attorney General on proposed rule amendment 10 CSR 10-5.160 Control of Odors in the Ambient Air.

You are currently considering amendments to the odor rules as they apply to Class 1A Confined Animal Feeding Operations, ("CAFOs"). Your odor rules have been a frequent litigation target. We prevailed in defeating the 1999 challenges filed by an industry group in both 1999 and 2003.

While this office supports the amendments now proposed, we offer these additional comments with a view of moving towards a better overall system for addressing odor problems in this state. In our view, the current rules simply do not go far enough to protect the state's air resources, guard the health of our citizens, and prevent nuisances that can make living conditions near odor sources utterly unbearable. The Attorney General therefore encourages the Commission to establish a forum for a wider discussion of how well or poorly the current odor control rules are working.

The failure of the current odor regime can best be illustrated by events surrounding the RES facility in Carthage, Missouri. Intolerable odors were emitted for an extended period of time and your staff monitored the facility on a daily basis for many months. On frequent occasions, the odor was wholly unacceptable but did not reach the threshold necessary to issue an NOV. But eventually six (6) NOV's were issued, a nuisance suit filed by this office and the City of Carthage and the DNR issued (and the Company appealed) an administrative order shutting down the facility. At the end of these processes all would agree that the Company has, to date, taken all reasonable and necessary steps to address and eliminate its odorous emissions. While we are pleased with this result--the process certainly has not been a model of measured and efficient resource management.

There are numerous other examples around the state where offensive odors have been suffered by the public, but the odors do not reach the 7:1 threshold at the time of staff inspections. The current system also places your staff in a nearly impossible situation of having to frequently defend the conclusion that it cannot act to address what all would agree are thoroughly offensive and yet preventable odors.

This office has and will continue to aggressively pursue public nuisance claims against those who would continually omit odors, but the process can be improved.

Department records suggest the vast majority of nuisance odor complaints do not result in the Department issuing an NOV. Missourians are not by nature complainers--we are used to and we tolerate unpleasant aromas if we understand them to be unpreventable or temporary. But once

the Department begins receiving vast numbers of legitimate complaints--complaints that are confirmed by your staff--it is time to act.

The State's system of odor management can be made more effective, fair and enforceable by:

1. Establishing a more protective odor tolerance threshold than 7:1;

2. Assuming a firm violated the standard with some pre-established frequency (i.e. more than once a month, four times per year, etc.), it would be required to do a comprehensive odor source identification and analysis and submit same to DNR.

3. Once the specific odor sources were identified--the offending company would then be required to submit an analysis of reasonable treatment alternatives in accordance with an established technical and regulatory standard (such as Reasonably Available Control Technology, ("RACT") or Best Available Control Technology,("BACT") etc).

4. If there were treatment technologies or process changes which met the chosen standard, the company would be required to install whatever device or process change as indicated pursuant to a reasonable schedule. Of course, entities would have the right to appeal any determinations by the Department to this commission and the courts as any final agency decisions.

The above process would essentially operate separately from the current enforcement standards. That is, no penalties or NOV's would be implicated by the violation of this lower threshold - only the obligation to evaluate and implement solutions would be triggered.

We believe the Work Group process instituted by the Commission in 1999 to establish the CAFO odor rule was beneficial and we would volunteer to participate in a similar effort to implement odor rule improvements. Of course, industrial, agricultural and public advocacy groups should play a role in this process and your staff should coordinate and provide support to the group's efforts. The Work Group should also address any other unworkable or impractical features of the existing rules.

Of course, Class 1A agricultural facilities may well need to be treated somewhat differently than industrial sources, (as do the existing rules) and urban and rural areas may merit differing thresholds and standards. We seek these changes in accordance with our Good Neighbor Policy- that large farm operations should not diminish their neighbors quality of life and that farm lands should be improved from generation to generation.

There have been wholesale advances in odor control technologies in recent years...lets put these available protections in place in prompt but orderly fashion without waiting until the situation merits enforcement.

We would appreciate the opportunity to assist you and your staff in this important endeavor and would look forward to the opportunity to serve on or with the Work Group.

The following comments were submitted by Washington University in St. Louis, School of Law, October 6, 2006.

Comments from Washington University in St. Louis, School of Law, on proposed rule amendment 10 CSR 10-5.160 Control of Odors in the Ambient Air.

Washington University in St. Louis
SCHOOL OF LAW

Civil Justice Clinic
Interdisciplinary Environmental Clinic

October 6, 2006

David Lamb, Chief, Operations Section
Missouri Department of Natural Resources
Air Pollution Control Program
P.O. Box 176
Jefferson City, MO 65102-0176

Re: Proposed Changes to 10 CSR 10-2.070, 10 CSR 10-3.090, 10 CSR 10-4.070, and 10 CSR 10-5.160.

Dear Mr. Lamb,

On behalf of the Citizens Legal Environmental Action Network (CLEAN), the Interdisciplinary Environmental Clinic (IEC) at Washington University in St. Louis submits the following comments regarding the proposed changes to 10 CSR 10-2.070, 10 CSR 10-3.090, 10 CSR 10-4.070, and 10 CSR 10-5.160 (collectively "the odor regulations"). As the proposed rule changes for each of these regulations are identical, this letter is intended to provide comment on all four of the above regulations.

CLEAN is an organization of rural Missourians who live near hog concentrated animal feeding operations ("CAFOs") operated by Premium Standard Farms and ContiGroup (collectively "PSF") in northern Missouri. Citizens living near the PSF facilities, as well as other CAFOs throughout the state, have become very frustrated with the offensive odors and air emissions they are forced to live with on an ongoing basis. Even more discouraging is the reluctance of the Department of Natural Resources (DNR) to investigate and enforce existing regulations when complaints are filed. The recent jury verdict in Jackson County Circuit Court, awarding six of PSF's neighbors a total of $4.5 million in damages (with punitive damage awards settled before a dollar value was assessed), underscores how offensive PSF's odors are to ordinary Missourians.

Screening Standard Should Not Be Weakened

One of the proposed rule changes involves altering the screening standard from a dilution ratio of 5.4:1 to a ratio of 7:1. Although DNR has already been using the screening standard of 7:1, the proposed regulatory change would, as DNR noted in a recent Missouri Air Conservation Commission (MACC) meeting, formally authorize a *decrease* or "relaxation" in stringency.[1]

[1] Meeting notes from the August 31, 2006 Missouri Air Conservation Commission meeting, in the September 28, 2006 Briefing Document, p. 19. Available at: http://www.dnr.mo.gov/env/apcp/docs/9-28-06briefdoc.pdf (last visited October 7, 2006).

Washington University in St. Louis, Campus Box 1120, One Brookings Drive, St. Louis, Missouri 63130-4899
(314) 935-7238, FAX: (314) 935-8717, www.wustl.edu

This change seems inappropriate when odor problems continue to threaten the health and quality of life of rural Missourians.

Additional Changes Are Necessary

In order to address more effectively these ongoing problems with odors, particularly from CAFOs, CLEAN requests that the Air Conservation Commission adopt the following additional changes to the odor regulations. If the Commission deems these proposed changes to be beyond the scope of this rulemaking, then CLEAN also submits this comment letter as a petition for rulemaking under § 536.041, R.S.Mo. CLEAN hereby requests that the Commission amend the CAFO odor regulations as follows:

(1) Remove the overly burdensome requirement for additional, outside testing to determine an odor violation related to CAFOs;
(2) Extend state-wide and to the CAFO context the approach currently used in the St. Louis area regulations to protect residential and other sensitive areas affected by offensive odors; and
(3) Require entities that generate offensive odors to do more to prevent such odors from occurring.

(1) Remove Burdensome Testing Requirement

10 CSR 10-2.070 (4)(C)2 and the corresponding sections of the other odor regulations[2] require two separate steps in order to establish an odor violation at a CAFO. First, field testing using a scentometer or similar field olfactometer instrument must twice meet a screening standard. Second, a sample must be taken and sent for additional lab testing. The second requirement should be removed because it is costly to the state, creates a disincentive for effective enforcement, is unnecessary, introduces more variability into the process, and gives CAFOs the benefit of the doubt at the expense of Missouri citizens' health and quality of life.

Additional laboratory olfactometry provides a disincentive for DNR to enforce the odor regulations at CAFOs because of the logistics and cost involved. DNR has repeatedly explained its failure to respond to neighbors' complaints regarding PSF-generated odor by reference to the laboratory test: "because of the one to two day advance notice required by the laboratory prior to analysis of air samples," no investigation was made of the complaint.[3] There is cost to the Department involved in obtaining samples, shipping them to the lab, and the laboratory analysis itself. The requirement for additional testing makes reasonable, timely investigation of numerous complaints unlikely if not impossible.

Furthermore, laboratory analysis is unnecessary. According to St. Croix Sensory, which manufactures both field and laboratory olfactometers:

> "Field olfactometry with a calibrated field olfactometer is a cost effective means to measure odor strength. Facility operators, community inspectors, and neighborhood

[2] 10 CSR 10-3.090(5)(C)2, 10 CSR 10-4.070(4)(C)2, and 10 CSR 10-5.160(3)(C)2.
[3] Missouri Air Conservation Commission Complaint Reports

citizens can confidently measure odor strength at specific locations around a facility's property line and within the community when using a calibrated field olfactometer."[4]

Although laboratory analysis provides the benefit of having more than one person judge the odor, the process of sampling and shipping odor for laboratory analysis can introduce additional variability that makes it hard to correlate laboratory measurements to in-field measurements. The regulation also already provides a built-in verification mechanism by requiring two time-separated readings at the screening level in the field. Additional testing that potentially introduces variability into the process is not necessary.

The current regulations impose this additional laboratory requirement solely upon odors from Class 1A CAFOs. This gives Class 1A CAFOs greater protection from enforcement of the odor regulations, when in fact they are a substantial source of offensive odors in the state. At a recent Missouri Air Conservation Commission meeting, DNR explained that the additional laboratory requirement serves as a regulatory favor to the CAFO industry: "CAFOs still have that benefit of a sample being taken and sent to a lab...Other industries don't have that benefit."[5] On the whole, CAFO operators in the state of Missouri have not shown themselves to be responsive to complaints of odor from their neighbors, some of which have persisted for well over a decade. They do not deserve to be given the benefit of the doubt in this matter, at the expense of the health and quality of life of their neighbors.

As far as CLEAN is aware, this additional laboratory requirement that benefits Class 1A CAFOs exists in no other state's odor regulations. We have found no other state odor regulations that require two different testing procedures to verify a violation from any source. CLEAN asks that the Commission remove this additional laboratory testing requirement. It is unnecessary, costly, and unfair to Missourians who happen to live near CAFOs.

(2) Extend St. Louis Approach to CAFOs and to Other Areas of the State

In addition to a more generally applicable ambient odor standard, the regulations should also specifically protect Missouri citizens from odors that invade their homes. The Commission has already employed this concept in the regulations regarding non-CAFO odors in the St. Louis region. In addition to the specific dilution standards applicable at industrial facilities (20:1) and elsewhere (4:1), the St. Louis regulations prohibit objectionable odors, regardless of dilution factor, when they adversely affect residences and other sensitive locations. The regulations state:

"No person shall emit odorous matter as to cause an objectionable odor on or adjacent to—1. Residential, recreational, institutional, retail sales, hotel, or educational premises."

10 CSR 10-5.160(1)(A)1. The St. Louis regulations then require a survey of people exposed to the non-diluted odor to determine whether it is objectionable or not. While such a survey would not be feasible in a less heavily populated rural area, the Commission should extend the

[4] *Measuring Composting Odors for Decision Making*, Michael McGinley and Charles McGinley, 2005, p. 5.

protection against objectionable odors at one's residence to all Missouri residents, whether they live near a CAFO or some other source of offensive odors. Specifically, the Commission should establish a 2:1 dilution threshold for odors affecting Missourians at their homes.

The Colorado regulations also employ this approach. Colorado regulations regarding housed commercial swine feeding operations establish a 2:1 standard applicable at "any occupied dwelling (occupied as a primary dwelling) or curtilage, public or private school, place of business, or the boundaries of any incorporated municipality that has not waived [...] protection," as well as a 7:1 standard applicable elsewhere.[6] This two-tier system allows for both sufficient flexibility for odor sources and adequate protection of public health and welfare.

Although some odor is obviously associated with agricultural activity, a 7:1 standard still allows for overwhelming, choking odors. Missouri citizens should not have to endure that kind of harmful odor at their homes, businesses, schools, or ballfields. CLEAN requests that the Commission extend the St. Louis concept state-wide by establishing a 2:1 odor standard applicable at residences and other sensitive locales for odors from any source.

(3) Require Odor Sources to Do More to Prevent Odor Problems

The abovementioned standards are used to ensure compliance and for the enforcement or violations. Even more crucial is the need to prevent odor at the source – before it threatens Missouri residents. To that end, the odor regulations currently require that each CAFO facility implement a DNR-approved odor control plan.[7] However, since those odor control plans were required in July 2000, odor control options have evolved and continue to evolve with regard to both technical and economic feasibility. For instance, the use of biofilters at hog CAFOs has become a far more effective and feasible option. Given the magnitude of the odor problem and the impact it has on Missouri citizens, CLEAN requests that the Commission amend the odor regulations to require CAFOs to revise and update, subject to DNR approval, their odor control plans (a) every five years and (b) in addition, following a violation of the odor standard.

In conclusion, because of the significant odor problems that continue to affect Missourians, CLEAN urges the Air Conservation Commission to amend the odor regulations to accomplish the three changes described above.

Respectfully submitted,

Maxine I. Lipeles, Director

St. Louis, MO 63130-4899
(314) 935-5837 (phone)
(314) 935-5171 (fax)
milipele@wulaw.wustl.edu

Attorneys for Citizens Legal Environmental Action Network (CLEAN)